



DEPARTMENT OF JUSTICE

MERGER ENFORCEMENT AT THE ANTITRUST DIVISION

DEBORAH PLATT MAJORAS
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

KPMG/Chicago Graduate School of Business
Mergers and Acquisitions Forum

September 27, 2002

As I am sure I do not need to explain to this audience, the current antitrust environment for mergers and acquisitions is characterized by a sharp downturn in m & a activity and, increasingly, though to a lesser extent thus far than you might imagine, firms purchasing assets in bankruptcy proceedings. The current environment is also marked by increased globalization, and with it our strong efforts to work together with other jurisdictions to rationalize the myriad merger notification and review processes that have emerged as other countries have adopted and begun enforcing competition laws.

Merger Filings and Challenges

I will begin by giving you some sense of the magnitude of the decrease in deal activity. During this fiscal year, which ends on Monday, we have received Hart-Scott-Rodino Act (“HSR Act”) filings for just over 1,100 transactions, compared to more than 4500 in Fiscal Year 2000 and roughly 2250 for Fiscal Year 2001. (Part of the reduction, of course, in 2001 and 2002 results from the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 2000, which raised the HSR filing threshold from \$15 million transactions to \$50 million transactions.) During the 15-month period since Charles James became Assistant Attorney General, the Antitrust Division has opened 131 preliminary investigations, issued second requests for additional information (“Second Requests”) to the parties in 27 of those investigations, and challenged 21 mergers. We were successful in 20 of those challenges. These matters have included:

- **General Dynamics/Newport News.** General Dynamics and Newport News were the only two nuclear-capable shipyards and the only designers and producers of nuclear submarines for the U.S. Navy. The two shipbuilders also lead opposing teams to develop “electric drive,” the next generation propulsion system for use in

submarines and surface combatants. The Department of Defense (“DoD”), the only customer, opposed the transaction on competitive grounds. The complaint alleged that the combination would create a monopoly in nuclear submarine design and construction, and would substantially lessen competition for electric drive and surface combatants. After the parties terminated their merger agreement, Northrop Grumman purchased Newport News in a transaction that did not raise significant competitive issues.

- **Suiza/Dean.** Suiza and Dean were dominant firms in several geographic markets for fluid milk processing and school milk. The parties agreed to divest 11 dairies to National Dairy Holdings, L.P. (NDH), a newly formed partnership that is 50 percent owned by Dairy Farmers of America Inc. (DFA), a dairy farmer cooperative. The parties also agreed to modify Suiza’s supply contract with DFA to ensure that dairies owned by the merged firm in the areas affected by the divestitures would be free to buy their milk from sources other than DFA.
- **United/USAirways.** At the time of the transaction, United and US Airways were the second and sixth largest U.S. airlines. The Division concluded that US Airways was United's most significant competitor on densely-traveled, high-revenue routes between their hubs, such as Philadelphia and Denver, as well as for nonstop travel to and from Washington, D.C. and Baltimore, and on many routes up and down the East Coast. The acquisition would have given United a monopoly or duopoly on nonstop service on more than 30 routes, where consumers spend more than \$1.6 billion annually, and substantially limited the competition it faces on numerous

other routes representing more than \$4 billion in revenues. The parties abandoned the transaction after the Division indicated its intention to challenge it.

- **3D Systems/DTM.** The Division concluded that the acquisition as initially proposed would have substantially lessened competition in the U.S. industrial rapid prototyping systems market by reducing the number of competitors in the U.S. market from three to two and limiting the dynamic competition that has resulted in lower prices to customers and technological improvements to rapid prototyping systems. Rapid prototyping is a process by which a machine transforms a computer design into three-dimensional objects, speeding the design process for everything from cellular phones to medical equipment. The Division filed suit to block the transaction, and subsequently reached a settlement with 3D Systems Corporation that allowed the company to go forward with its purchase of DTM Corporation, provided that the merged 3D/DTM agreed to license their rapid prototyping patents to a company that currently manufactures rapid prototyping equipment outside of the U.S. and that will now compete in the U.S. market, thus adding a new entrant.

The Division also has challenged mergers in a number of other markets, including airline reservations systems, banking, boom trucks, fresh bread, molded doors and doorskins, electric power, ready-mix concrete, corn wet milling, college textbooks, and computer-based testing. And, we have on our docket today several important merger investigations, including investigations of the DirecTV/Echostar transaction, the AT&T transaction, and the Northrop Grumman/TRW transaction.

We have also been active in cases related to our merger enforcement process, filing two cases against “gun-jumping” and other violations of the HSR premerger notification and waiting period requirements, and another for violations of a “hold separate” agreement. Earlier this year, we settled a “gun-jumping” complaint against Computer Associates and Platinum Technology, which alleged violations of both Section 7A of the Clayton Act and Section 1 of the Sherman Act. In another Section 7A case, the Hearst Corporation and its parent, The Hearst Trust, agreed to pay a civil penalty of \$4 million to resolve charges that the company failed to produce key documents required to have been supplied along with its premerger notification of the acquisition of Medi-Span. The Division filed the lawsuit at the request of the Federal Trade Commission (“FTC”), and the civil penalty is the largest a company has ever paid for violating antitrust premerger requirements.

Most recently, we filed a proposed settlement agreement with Earthgrains Baking Companies, Inc. to resolve our concerns about violations of a consent decree governing Earthgrains’ 2000 acquisition of Metz Baking Company. In a petition filed along with the settlement agreement, the Division alleged that Earthgrains violated the 2000 consent decree by failing to maintain the required level of promotion support for brands that were to be divested under the decree, by transferring employees who worked at a bakery that was to be divested under the decree, and by closing the bakery prior to its divestiture. Earthgrains agreed to pay a \$100,000 civil penalty. More importantly, the case underscores the need for companies to abide by the terms of consent decrees, and

demonstrates that we will aggressively enforce decrees to ensure that they serve their purpose of maintaining competition.

Looking ahead, many predict that economic circumstances inevitably will lead to significant consolidation in some industries and that, in reviewing particular transactions, we will have to weigh the financial condition of one or both parties as a key factor in the analysis. Financial circumstances can, of course, be a factor in merger analysis where, for example, one of the firms meets the requirements for the “failing firm” defense in the Merger Guidelines¹ or where a firm’s financial condition limits in some substantial way its ability to compete. We will consider such arguments carefully, recognizing that balanced merger enforcement is important whether or not industries are experiencing growth.

Global Merger Enforcement

Turning to the international arena, there are now nearly 100 national and regional antitrust regimes in the world, with roughly 65 requiring some form of premerger notification. While this is a positive development, at least in part resulting from our sustained efforts to encourage other countries to adopt and enforce antitrust laws, the assertion of overlapping antitrust jurisdiction by multiple sovereigns has the potential to harm some of the very competitive values that antitrust is meant to protect. As the nations of the world adopt and implement their own antitrust laws, we need to continue exercising leadership to prevent antitrust enforcement from being misused as a tool of industrial

¹U.S. Dept. of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 5, *reprinted in* 4 TRADE REG. REP. (CCH) § 13,104 (1992, revised 1997).

policy or protectionism and thereby jeopardizing the strong public and political support for sound and vigorous antitrust enforcement.

Last October we, along with the FTC, were among the lead jurisdictions to launch the International Competition Network (“ICN”), to develop guiding principles and “best practices” to be endorsed and then implemented voluntarily. The ICN now includes 65 jurisdictions on six continents, representing over 70 percent of the world’s GDP. The ICN is convening its first annual meeting in Naples, Italy almost as we speak.

The ICN exists as a “virtual” network through which agency heads commission and guide the efforts of working groups focused on specific competition law issues. The working groups themselves are directed by government personnel, who receive input from a broad range of sources, including international organizations, academics, industry groups and leaders, and private practitioners. The working groups’ recommendations will be considered by the ICN members, but implemented, if at all, through separate governmental initiatives. The ICN itself will not be a forum for reaching binding international agreements.

Our convergence efforts with other competition authorities around the world are based on six principles:

- Protect competition, not competitors.**
- Recognize the central role of efficiencies in antitrust analysis.**
- Base decisions on sound economics and hard evidence.**
- Acknowledge the limits to our predictive capabilities, remaining flexible and forward-looking.**

- **Impose no unnecessary bureaucratic costs.**

The ICN has initiated two major projects in the first year of its existence. First, under the leadership of the Antitrust Division’s Deputy Assistant Attorney General for International Enforcement, a Merger Working Group is addressing several aspects of the difficult issues raised by multi-jurisdictional merger review, including merger notification and review procedures, the various analytical frameworks pursuant to which mergers are reviewed around the world, and investigative techniques.

A subgroup of 13 agencies has recommended that the entire ICN adopt broad guiding principles involving such things as transparency of merger processes, non-discrimination on the basis of nationality, and efficient, timely, and effective merger review. This subgroup has also recommended that the ICN adopt more technical “recommended practices,” such as having a sufficient nexus between the transaction and the reviewing jurisdiction, and having clear and objective notification thresholds. If adopted and implemented by ICN members, we will have taken an important first step in rationalizing the current thicket of multi-jurisdictional merger enforcement in a way that well-serves the competitive process worldwide. With respect to improving merger investigative processes, later this fall, we will host a conference in Washington for merger officials from dozens of countries, with the goal of increasing understanding and pursuing healthy convergence in the practical aspects of our various merger regimes.

With respect to the second ICN initiative, the head of the Mexican antitrust agency leads a working group on competition advocacy, a subject that is particularly important to developing countries and countries in transition. This working group will produce a

comprehensive report on the practice of competition advocacy in 50 ICN jurisdictions, an unprecedented effort that should form the basis, among other things, for deriving recommended practices in the practice of competition advocacy.

And that is just the beginning. We will move on to new projects in the coming year, with the goal of further harmonizing multi-jurisdictional review and other aspects of international antitrust enforcement.

The European Union currently stands as the most important antitrust enforcer outside of the United States. There have been limited occasions when we and the EU have disagreed on the appropriate resolution of an enforcement matter. Significantly, our divergence on the GE/Honeywell merger has served as a catalyst for making our relationship with the EU more substantive and more action-oriented than ever before. As a result, both sides agree that the relationship has been strengthened and improved. Despite our different legal traditions and cultures, and despite differences in the language of our governing laws, we have been able to develop largely consistent competition policies, built on sound economic foundations directed at the goal of promoting consumer welfare through competition.

One vehicle we are using to pursue our shared goals is our U.S.-EU Merger Working Group, which we reinvigorated last September following our divergence on the GE/Honeywell transaction. The working group is examining several issues, including merger process and timing, the analysis of conglomerate mergers, and the role of efficiencies in merger analysis. Through this Working Group, we have been developing “best practices” for coordinating merger investigations subject to both U.S. and EU review,

and expect to announce agreement on such practices in the near future. These best practices are designed to minimize the risk of divergent outcomes, facilitate coherence and compatibility in remedies, enhance investigative efficiency, and reduce burdens on those subject to multiple antitrust reviews.

Policy Initiatives

Today's confluence of events — the current dearth in mergers and acquisitions; the previous merger wave, which ended with the millennium and which provided a high level of enforcement activity to observe; our increased efforts to work toward closer convergence among enforcers globally; and the natural and even expected tendency of a new enforcement regime to set new and priorities goals -- has led us to attempt to redefine basic principles and policies in merger enforcement and to rediscover others. For example, at the Antitrust Division, we have a team of lawyers and economists who are closely reviewing coordinated effects analysis in merger review. In this process of "rediscovering" coordinated effects analysis, we are drawing upon case precedent and experience, as well as the prevailing legal and economics literature, and also sharing our perspectives with the FTC. During the last several years, unilateral effects theory has emerged as the predominant theory of economic harm pursued in government merger investigations and challenges. At the same time, however, through our criminal enforcement program, we have learned that even express collusion is a strategy firms in some industries continue to employ. While a viable theory of harm, unilateral effects should not be the theory of choice by default. If we automatically rely on unilateral effects analysis to the exclusion of

coordinated effects analysis, we risk missing important cases that should be brought or crafting our relief too narrowly in cases we do bring.

In another important project, we are thoroughly reviewing the entire civil remedy process, including merger remedies, by examining our guiding principles and the legal and economic bases for imposing particular remedies. There is little benefit and the potential for serious harm to challenging a particular transaction if the remedy does not fix the competitive problem. Together with the FTC, we have been holding and are about to conclude, joint hearings on enforcement policy issues at the intersection of antitrust and intellectual property law, including issues that often arise in merger review. At these hearings, we have heard from a broad cross-section of business leaders, legal practitioners, economists, and other academics who have experience in this area. Obviously, intellectual property issues arise with increasing frequency in merger review, as the significant assets that firms own and sell are increasingly their intellectual property, creation and dissemination of which drives economic growth. While intellectual property and antitrust law share the common purpose of promoting dynamic competition to the benefit of consumers, issues at the intersection of the two bodies of law can be complicated, and we must carefully address those issues as we seek to maintain incentives for innovation and creativity. In the merger area, the hearing participants explored such areas as the impact of market concentration on innovation, and vice versa; the competitive effect of aggregating blocking patents; the role of patent validity and infringement in evaluating competitive effects and entry; and the use of intellectual property licenses in remedies. We

expect to publish a report in 2003, which we hope will provide important insights into the intersection of antitrust and intellectual property law.

An additional area that we are reviewing and in which we hope to provide additional guidance to the public is “gun-jumping.” The HSR Act requires merging parties to observe a mandatory 30-day waiting period (15 days in the case of a cash tender offer), after which the companies may proceed with the transaction if neither the Antitrust Division nor the FTC requests additional information about the transaction. A primary purpose of the HSR waiting period is, of course, to prevent merging parties from combining during the pendency of an antitrust review, so that they remain separate and independent actors during that time. Section 1 of the Sherman Act prohibits any contract, combination or conspiracy in restraint of trade, and the pendency of a proposed merger does not excuse the merging parties from their obligations to compete independently. As a result, pending the consummation of a merger, a merging firm that attempts to or in fact controls or influences the decisions of its merger partner with regard to price, output, or some other competitively significant matter may be violating Section 1, as well as the HSR Act. We know that additional clarity concerning the Division’s views on this issue would be helpful to the public, and as such, we, together with the FTC, have undertaken a review of this issue.

Finally, on the process front, roughly a year ago, we implemented our Merger Review Process Initiative, which established a number of methods for making the initial 15- or 30-day HSR waiting period more productive, and streamlined both the Second Requests that are issued and the staff’s assembling and analysis of information post-Second

Request. The procedures outlined in the Merger Review Process Initiative are designed to encourage Division staff and the merging parties to more quickly identify critical legal, factual, and economic issues regarding proposed mergers, facilitate more efficient and more focused investigative discovery, and provide for an effective process for the evaluation of evidence. A key component of the process is that staff are authorized and encouraged to actively tailor investigative plans and strategies according to each proposed transaction, in lieu of reliance on standardized procedures or models. While the dearth in merger activity has led to only limited experimentation with this Initiative, the early feedback, both from staff and parties, has been quite positive.

Alarming Deja Vu?

One area of merger law and enforcement policy and practice that has emerged as an important issue is the appropriate analysis for conglomerate mergers. It is an issue that, in the wake of the *GE/Honeywell* merger, we have spent a fair amount of time thinking about, and that thinking, in turn, has re-focused us on the purpose of merger enforcement and of the antitrust laws in general.

Former Assistant Attorney General Thurman Arnold said, more than 60 years ago, that “the economic philosophy behind the antitrust laws is a tough philosophy. [Those laws] recognize that someone may go bankrupt. They do not contemplate a game in which everyone who plays can win.”² Nonetheless, the 1960's brought us the Great Structural

²*Quoted by Jack Brooks, Address at Symposium in Commemoration of the 60th Anniversary of the Establishment of the Antitrust Division (Jan. 10, 1994).*

Age of antitrust law and when, from 1965 to 1975, the United States experienced a wave of conglomerate mergers, there developed considerable political concern about a “rising tide of concentration” resulting from them. There is no question that many in the United States believed that “big is bad.”

In response to the concerns, the U.S. antitrust agencies challenged a number of conglomerate mergers under various theories. In one of these cases, *FTC v. Procter & Gamble Co.*,³ the FTC successfully alleged “entrenchment” as a theory of competitive harm. In that case, Procter & Gamble, a large, diversified manufacturer of household products, primarily soaps and detergents, was attempting to acquire Clorox, which had a 49 percent market share in the household bleach market. Although P&G did not manufacture bleach, the Supreme Court agreed with the FTC that the acquisition might substantially lessen competition. According to the Court, not only would the acquisition eliminate P&G as a potential entrant into the bleach market, but “the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing.”⁴ The Court focused on the importance of advertising as “the major competitive weapon” in the bleach market and determined that, because P&G had a larger budget than Clorox, it could use it to defeat the threat of new entry and could use volume discounts to its advantage when advertising

³386 U.S. 568 (1967).

⁴*Id.* at 578.

Clorox.⁵ Also, Clorox might get preferred shelf space, and “Procter might underprice Clorox in order to drive out competition, and subsidize the underpricing with revenue from other products.”⁶ New entrants, concluded the Court, would be “much more reluctant to face the giant Procter than . . . the smaller Clorox.”⁷

This *Procter & Gamble* decision led a number of lower courts to apply entrenchment and related theories in barring mergers and acquisitions. Entrenchment theory was rooted in three primary concerns: (1) that the merger would create a financially strong company or “deep pocket” that would discourage entry by other firms, (2) that the financially strong new firm would engage in predatory conduct, and (3) (perhaps most alarming) that the merger would enable the firm to achieve efficiencies not available to other firms.

Significantly (and fortunately), the courts’ application of entrenchment theory led legal and economics scholars to critically examine the theory, resulting in the *Procter & Gamble* decision rather quickly going the way of *Von’s Grocery*, *Schwinn*, *Albrecht*, and *Topco* as one of the most heavily criticized antitrust decisions of the Warren Court. In their *Antitrust Law* treatise, Phillip Areeda and Donald Turner showed that to condemn conglomerate mergers because they might enable the merged firm to capture cost savings and other efficiencies, thus giving it a competitive advantage over other firms, is contrary to sound antitrust policy, because cost savings are socially desirable.⁸ “Antitrust law

⁵*Id.* at 579.

⁶*Id.* at 575.

⁷*Id.* at 579.

⁸*Id.* ¶1103c at 9.

promotes competition because it is efficient.”⁹ Regarding the concern that a conglomerate will have the competitive advantage of a wider product line, Professors Areeda and Turner posit that the merged firm may offer packages or one-stop shopping to buyers, which may represent real savings to buyers and which competitors can attempt to match.¹⁰ And, they say, there is no need to bar such a merger based on a speculative concern that the merged firm will illegally tie the products, because the antitrust laws are strong enough to address the tying should it actually occur.¹¹

Robert Bork, in *The Antitrust Paradox*, argued that “[t]he *Procter & Gamble* decision only makes sense when antitrust is viewed as pro-small business — and even then it does not make much sense, because small business is protected from Clorox’s cost advantages only when they happen to be achieved through merger.”¹² He went on to criticize the Supreme Court and the FTC for condemning a merger on the basis of efficiencies. Far from “frightening smaller companies into semiparalysis,” Bork argued that mergers that generate efficiencies will force smaller competitors “to improve, rather than worsen, their competitive performance,” which benefits consumers.¹³

Thus, *Procter & Gamble* and decisions like it, with a significant push from the Chicago School, ultimately led us to the introduction of greater economic rigor and a focus

⁹ *Id.*

¹⁰ *Id.* ¶1109d at 36.

¹¹ *Id.* ¶1134 at 208.

¹² Robert H. Bork, *The Antitrust Paradox*, at 252 (1978).

¹³ *Id.* at 256-57.

on consumer welfare and efficiency in antitrust analysis. In a complete rewrite of the 1968 Merger Guidelines, in 1982, the Department of Justice Antitrust Division under the leadership of Bill Baxter eliminated entrenchment as a basis for challenging non-horizontal mergers. Although the Supreme Court never revisited entrenchment theory or explicitly overruled *Procter & Gamble*, its subsequent antitrust decisions make it unlikely that the Court will again apply such theories.¹⁴

So, if we killed theories like entrenchment 20 years ago, why am I bothering to discuss it on a panel addressing “the Current Antitrust Environment”? Why should we care? We must care because entrenchment and similar theories with primarily competitor-protecting rationales are quietly reemerging in advocacy for strategic reasons, even in the United States. As the economy is developing today, and as the stakes of every business investment and strategy become larger and larger, firms -- even if they may publicly decry regulation -- are driven to seek protection from governments. This is true particularly of firms in industries that previously were regulated but now turn to antitrust authorities to replace industry-specific regulators. It also is especially true for competitors in high-tech markets in the so-called “New Economy.” These markets, and particularly

¹⁴*See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (“The purpose of the [Sherman] Act is not to protect business from the working of the market; it is to protect the public from failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself...”); *Montfort of Colorado, Inc. v. Cargill, Inc.*, 479 U.S. 104 (1986) (“[C]ompetition for increased market share is not activity forbidden by the antitrust laws. It is simply vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for “[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.”).

those characterized by network efficiencies, tend to raise competitive concerns that are more vertical or complementary than horizontal. And as these market mature, their potential for entry, growth, and success no longer seems limitless as it did to some in the late 1990's. In addition, the economic significance of installed base and network efficiencies has become more apparent. So, firms that only a few years ago perceived the antitrust laws as too static to be applied to rapidly moving markets and too stifling to encourage innovation are now turning to antitrust enforcers for help.

While we have always needed and appreciated receiving assistance on the facts from customers, competitors, and other third parties, we have to test the facts and analyze them according to the antitrust laws and sound economic principles. But, today, competitors in particular go way beyond providing interviews and documents. In what was not too many years ago considered unseemly, they are hiring lobbyists and public relations firms and self-proclaimed public interest groups to try to influence our decisions not only through advocacy directly to the agencies, but also through aggressive media and Congressional strategies. If we do not share their viewpoints, they try the state attorneys general, Congress, and non-U.S. antitrust enforcers.

Amid arguments made by competitors today are clear remnants of entrenchment and like theories. After all, GE's and Honeywell's competitors did not make their arguments for why the transaction should be blocked only to the European Commission; rather, they made the arguments to us as well. And they are not alone. We believe this is a potentially dangerous development.

The balancing act for antitrust policy is to protect the competitive process without seeking to regulate market outcomes, and certainly without punishing success. In this regard, it is useful to review the reasons we challenge mergers. We challenge horizontal mergers because they eliminate a competitor and may thereby enable the merged firm to restrict output and raise price. Similarly, we challenge vertical mergers that eliminate a key input, supplier, or customer where doing so may unreasonably foreclose competition. We do not protect competitors from mergers that will make the merged firm more efficient, even if they fear they may as a result be forced from the market, because competition is a means to an end, and not an end in itself. As former Treasury Secretary Larry Summers reminded us at last year's ABA Antitrust Section Spring Meeting: "The goal is efficiency, not competition. The ultimate goal is that there be efficiency."¹⁵ Production and transactional efficiencies benefit consumers by lowering the costs of goods and services or by increasing their value. Allocative efficiencies benefit consumers by moving the allocation of scarce resources toward a situation where no rearrangement of those assets would enhance welfare. Again, we value competition, not as an end in itself, but because it promotes both types of efficiency.

Recognizing that efficiency is the ultimate goal should make us very cautious about adopting a merger policy that sacrifices obvious efficiencies in the name of preserving less efficient competitors. At a minimum, before applying such a policy, we should make certain that we have a high degree of confidence that the trade-off we are making will

¹⁵Lawrence H. Summers, *Competition Policy in the New Economy*, 69 Antitrust L.J. 353, 358 (2001).

ultimately benefit consumers. This would require quantifying the efficiencies and determining the likely duration of the competitive round that will occur before less efficient rivals are forced from the market. It would also require a high degree of confidence that the rivals will in fact be forced from the market — that they will not be able to develop counter-strategies that will enable them to become more efficient themselves in order to survive. It would also require us to estimate the size of the price increases likely to occur once the merged firm gains market power to determine whether, taking into account the efficiencies, future prices to consumers are likely to be higher or lower than they would be in a market populated by several less efficient firms. Finally, we would have to determine the likely duration of the monopoly period — which would be dependent on entry conditions at the time the monopoly is finally achieved.

We are humble about our ability to make these judgments, which would necessarily involve predictions far out into the future. We have more confidence in the self-correcting nature of markets. This confidence is especially great when the markets are populated by strong rivals and strong buyers, who will usually find ways to protect themselves from an aspiring monopolist. Our strong belief in markets and our humility in our own predictive abilities lead us to be skeptical of claims by rivals that a merger will lead to their ultimate demise and to demand strong empirical proof before we will accept such claims.

Based on these principles, antitrust should rarely, if ever, interfere with any conglomerate merger. Under only the rarest conditions will a conglomerate merger, unlike a horizontal or vertical merger, likely give the merged firm the ability and incentive to raise price and restrict output. Conversely, conglomerate mergers have the potential as a

class to generate significant efficiencies. These potential benefits include providing infusions of capital; improving management efficiency either through replacement of mediocre executives or reinforcement of good ones with superior financial control and management information systems; transfer of technical and marketing know-how and best practices across traditional industry lines; meshing of research and distribution; increasing ability to ride out economic fluctuations through diversification; and providing owners-managers a market for selling the enterprises they created, thus encouraging entrepreneurship and risk-taking.

I submit that acting according to these principles — rather than any one-shot, help-me-today theories sponsored by concerned competitors — is not only best good for consumers, but also benefits all firms in the long run. Court decisions and law enforcement decisions for which a firm successfully lobbies today are precedential, and any laws affecting competition that are passed by Congress are permanent, at least for some period of time. Consequently, no new law or precedent for which a firm successfully lobbies will be directed at just that firm's competitor just one time. Eventually, the tables will turn and firms that once lobbied for an action may be looking down the barrel of it.